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IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1971

No. 71-5103

JOHN J. MORRISSEY and
G. DONALD BOOHER,

Petitioners,

v.

LOU V. BREWER, WARDEN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF

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OPINIONS BELOW

The Orders of the United States District Court for the Southern District of Iowa denying the Petitioners' respective Petitions for Writ of Habeas Corpus have not been reported, but they are reproduced in the Single Appendix filed herein at pages 70-71 and 113-114.

The Opinion of the United States Court of Appeals for the Eighth Circuit, affirming the above referred to Orders of the District Court, is reported at 443 F.2d 942 (8th Cir. 1971).

JURISDICTION

The jurisdictional requisites are adequately set forth in Petitioners' Brief at page 2.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions of the Fourteenth Amendment to the Constitution of the United States and of Section 247.5, 247.9 and 247.12, Code of Iowa (1971) are set forth in Petitioners' Brief at pages 2-3.

QUESTION PRESENTED

The question presented for review is whether the due process clause of the Fourteenth Amendment to the United States Constitution requires an evidentiary hearing prior to the revocation by the Iowa Board of Parole of a parole which had been granted by said State Board of Parole.

STATEMENT OF THE CASE

The case herein concerns two separate Petitions for Writ of Habeas Corpus which were denied by the United States District Court for the Southern District of Iowa on April 15, 1970, and June 10, 1970, respectively. In both cases jurisdiction in the District Court was based upon 28 U.S.C. § 2254. The denial of each petition was appealed to the United States Court of Appeals for the Eighth Circuit where the two were consolidated, heard by the Court *en banc*, and affirmed. The factual circumstances involved in each of these cases are set forth in the following paragraphs.

Petition of John J. Morrissey

On January 4, 1967, Petitioner John J. Morrissey entered a plea of guilty to a County Attorney's Information charging him with false uttering of a check. Morrissey was sentenced by the Linn County District Court in Cedar Rapids, Iowa,

to a term not exceeding seven (7) years in the Iowa State Penitentiary (A. 42-43). After serving a portion of his sentence, Morrissey was granted parole by the Iowa Board of Parole and released from the Iowa State Penitentiary on June 20, 1968 (A. 30). On or about January 24, 1969, he was arrested, in Cedar Rapids, Iowa, for violation of his parole (A. 65-69). He was held in the Linn County jail on a hold order issued by his parole agent. Subsequently on January 31, 1969, an Order was entered by the Iowa Board of Parole revoking his parole and returning him to the Iowa State Penitentiary (A. 30).

On June 25, 1969, Morrissey petitioned the District Court of the State of Iowa in and for Lee County, Iowa, for a Writ of Habeas Corpus alleging his parole revocation was invalid for lack of a prior hearing and appointment of counsel. The petition was dismissed by the District Court (A. 54-58). On July 8, 1969, Morrissey filed a Petition for Writ of Habeas Corpus in the Supreme Court of Iowa. The Supreme Court of Iowa dismissed his petition July 25, 1969, stating the petition was not made to the Court or Judge most convenient to the Petitioner as required by Iowa law; and that the legality of his incarceration had been adjudged by a previous ruling on his petition by the Lee County District Court; and that if he was entitled to any relief his remedy would be to appeal the denial of his petition to the Iowa Supreme Court (A. 30).

On August 11, 1969, Morrissey filed his Notice of Appeal to the Supreme Court (A. 60). Said appeal was dismissed on September 15, 1969, on the grounds it was not filed within the time specified by Iowa law (A. 37).

On September 12, 1969, Petitioner Morrissey filed his Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of Iowa (A. 3-7). This petition was denied April 15, 1970 (A. 70-71). A Notice of Appeal from said denial was filed on April 21, 1970; the same was considered by the District Court to be an Application for Certificate of Probable Cause pursuant

to 28 U.S.C. § 2253, and was denied April 21, 1970 (A. 72-72, 74).

The United States Court of Appeals for the Eighth Circuit Granted Morrissey's Application for Certificate of Probable Cause on June 3, 1970, and appointed counsel to represent him on his appeal (A. 75). Denial of Morrissey's petition by the District Court was affirmed by the Court of Appeals *en banc*, the opinion and judgment being filed April 21, 1971 (A. 119-154, 155).

Petition of G. Donald Booher

On April 29, 1968, Petitioner G. Donald Booher entered a plea of guilty to a County Attorney's Information charging him with forgery. He was senteneed by the O'Brien County District Court, Primghar, Iowa, to a term not exceeding ten (10) years in the Iowa State Penitentiary (A. 110). Subsequently, on November 14, 1968, Booher was granted a parole and released from the Iowa State Penitentiary (A. 110). On or about August 28, 1969, Booher was confined in the O.Brien County Jail for parole violation (A. 109); and on September 13, 1969, an Order was entered by the Iowa Board of Parole revoking his parole and ordering his return to the Iowa State Penitentiary (A. 110).

On November 21, 1969, Booher filed a Petition for Writ of Habeas Corpus in the District Court of the State of Iowa in and for Lee County alleging his constitutional rights had been violated in that he had not been given a hearing prior to the revocation of his parole. This petition was denied on November 26, 1969 (A. 96). Subsequently, another Petition for Writ of Habeas Corpus was filed in Lee County District Court on December 22, 1969. It was also denied, January 6, 1970, on the basis it presented no grounds for relief that did not exist at the time of the filing of the first petition (A. 97). A third petition was filed in the Lee County District Court on February 26, 1970. It was denied for the same reasons set out in the denial of the second petition (A. 98).

On March 11, 1970, Booher filed a Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of Iowa (A. 78-85); which petition was denied on June 10, 1970 (A. 113-114). On June 16, 1970, Booher filed an Application for Certificate of Probable Cause in the United States District Court for the Southern District of Iowa (A. 115), the same being denied by the Court on that date (A. 116-117).

The United States Court of Appeals for the Eighth Circuit granted Booher's Application for Certificate of Probable Cause on July 23, 1970 (A. 115). Booher's cause was consolidated with that of Morrissey and appointed counsel was ordered to prepare a joint brief (A. 118).

The denial of Booher's Petition for Writ of Habeas Corpus by the District Court was affirmed by the Court of Appeals *en banc*, the Opinion and Judgment being filed April 21, 1971 (A. 119-154, 156). A Petition for Rehearing filed by Booher *pro se* was denied on June 7, 1971 (A. 161).

SUMMARY OF ARGUMENT

The Iowa Board of Parole granted and revoked the paroles of Morrissey and Booher pursuant to statutory authority. Such statutory authority does not require a hearing prior to parole revocation.

The parole revocations in the case at bar were actions taken subsequent to final judgment and were not a critical stage of a criminal proceeding. Accordingly, this Court's holding in *Mempa v. Rhay* stating there was a right to counsel at a probation revocation does not require a hearing at a parole revocation.

The administration of the legislatively created procedures governing parole is a function of the state which involves a significant governmental interest in the protection, welfare, and security of the state's society. Thus, application of the balancing test suggested in *Goldberg v. Kelly* would not require the result requested by Petitioners in the instant situation.

There is a mutuality of purpose between the parolee and the Parole Board in that the primary interest of both is the integration of the inmate back into society. Requiring a due process hearing at the parole revocation stage would create an adversary proceeding and severely damage the Board's function in the role of *parens patriae*. Furthermore, such a hearing would provide no meaningful benefit to the parolee since the great majority of returnees admit the violations alleged.

The parole system as it presently operates provides sufficient protection against arbitrary action. The returnee is given notice of his alleged violations, and, subsequent to initial revocation but prior to final disposition of his case, he is given a hearing before the full membership of the Board of Parole. No further process is required or due.

ARGUMENT

The revocation of parole involves two separate determinations.

1. A determination as to whether or not there has, in fact, been a parole violation by the parolee.
2. A determination, based on the established parole violation, as to whether or not parole should be revoked.

The due process question presented in the case at bar pertains only to the first of these determinations; the establishment of the fact of parole violation. Once such violation has been established, it appears clear, and Petitioners do not contend otherwise, that the determination of whether or not parole is to be revoked is a matter solely within the discretion and expert judgment of the Board of Parole.

The Iowa Board of Parole granted and revoked the paroles of both Petitioner Morrissey and Petitioner Booher pursuant to the authority of Sections 247.5 and 247.9, Code of Iowa (1971) which provide in part, as follows:

"247.5 *Power to parole after commitment - detainers.* The board of parole shall determine which of the inmates of the state penal institutions qualify and thereafter shall be placed upon parole. Once an inmate is placed on parole he shall be under the supervision of the director of the division of corrections of the department of social services. There shall be sufficient number of parole agents to insure proper supervision of all persons placed on parole. Parole agents shall not revoke the parole of any person but may recommend that the board of parole revoke such parole . . . ."

"247.9 *Legal custody of paroled prisoners.* All paroled prisoners shall remain, while on parole, in the legal custody of the warden or superintendent and under the control of the chief parole officer, and shall be subject, at any time, to be taken into custody and returned to the institution from which they were paroled."

In interpreting these statutes, the Iowa Supreme Court has consistently held that the granting of a parole is an act of grace of the State which confers no vested rights upon the inmate and is subject to withdrawal at the discretion of the granting authority. Cf. *Cole v. Holiday*, 171 N.W.2d 603 (Iowa 1969); *State v. Rath*, 258 Iowa 568, 139 N.W.2d 468 (1966). The Iowa Supreme Court has additionally held that the revocation of the gratuitously granted parole without a hearing prior to the revocation, in no way violates either state or federal constitutional guarantees. *Curtis v. Bennett*, 256 Iowa 1164, 131 N.W.2d 1 (1964).

The United States Court of Appeals for the Eighth Circuit has previously approved the Iowa court's position on this matter stating:

"A parole is a matter of grace not a vested right. A large discretion is left to the states as to the manner and terms upon which paroles may be granted and revoked. Federal due process does

not require that a parole revocation be predicated upon notice and opportunity to be heard." (*Curtis v. Bennett*, 351 F.2d 931, 933 (8th Cir. 1965)).

In addition to the Iowa Supreme Court and the United States Court of Appeals for the Eighth Circuit, various other federal courts of appeal which have considered questions similar to that raised in the instant case, have held that the procedural protections of the due process clause are not required in revocation of parole proceedings. *Allen v. Perini*, 424 F.2d 134 (6th Cir. 1970), *cert. denied*, 400 U.S. 906 (1970); *Rose v. Haskins*, 388 F.2d 91 (6th Cir. 1968), *cert. denied*, 393 U.S. 946 (1968); *Williams v. Dunbar*, 377 F.2d 505 (9th Cir. 1967), *cert. denied*, 389 U.S. 866 (1967); *Hyser v. Reed*, 318 F.2d 225, 238 (D.C. Cir. 1963), cert. denied sub nom *Thompson v. United States Board of Parole*, 375 U.S. 957 (1963). Contra, *Hahn v. Burke*, 430 F.2d 109 (8th Cir. 1970); *cert. denied*, 402 U.S. 933, (1971); *Hewett v. North Carolina*, 415 F.2d 1316 (4th Cir. 1969).[1]

[1] Both the *Hahn v. Burke* and *Hewett v. North Carolina* cases are distinguishable from the case at bar in that both involved revocation of probation, rather than revocation of parole. Probation involves a release by the court before sentence has commenced and is more directly covered by the rules set out in *Memro v. Rhay* than is the present situation. In a probation situation a sentence has not been factually imposed, and the court still retains control of the individual. Thus, the court's jurisdiction has not been terminated, and the criminal proceeding is still open. Such is clearly not the case in a parole situation. Indeed, it is significant to note that the court in *Hahn* specifically commented that it was not faced with the question of the constitutional right to a hearing upon the revocation of a parole and did not purport to decide that issue.

I.

REVOCATION OF PAROLE IS NOT A "CRITICAL STAGE" IN A CRIMINAL PROCEEDING

The instant cases do not involve the review of a previous judicial proceeding, but rather present the question of whether a state administrative body, pursuant to statutory authority, may revoke a parole it has previously granted. Petitioners do not accept this position. They rely heavily upon *Mempa* v. *Rhay*, 389 U.S. 128 (1967) as authority for their contention that a parole revocation is in fact a critical stage of the criminal proceeding.

In *Mempa*, the defendant, with the advice of court-appointed counsel, pleaded guilty to the crime of joy riding and was placed on probation with imposition of sentence deferred. Approximately two months later the probation authorities applied to have his probation status revoked for violation of the terms of probation. At a revocation hearing before the court, the defendant, without counsel, was found to have violated the terms of his probation. Probation was revoked and the defendant was sentenced to the maximum term, as was provided by Washington State law. The revocation procedure was affirmed by the Washington Supreme Court. On certiorari, this court reversed, holding that when sentence is pronounced after a period of deferred imposition, such sentencing is a "critical" stage of a criminal prosecution, and counsel is required at that point. *Mempa* is clearly distinguishable from the case at bar, since it, like *Miranda* v. *Arizona*, 384 U.S. 436 (1966) and *Re Gault*, 387 U.S. 1 (1967), involved procedures concerning the initial incarceration of the criminal accused (*Alvarez* v. *Turner*, 422 F.2d 214 (10th Cir. 1970). Additionally, *Mempa* also involved a Washington statute which provided that an appeal of the case by the defendant was only available subsequent to revocation of probation. Thus, the presence of counsel at that revocation was necessary to insure full protection of the defendant's appeal rights.

In the instant case, sentencing of both Morrissey and Booher had been completed, and the criminal proceedings against them were terminated by that final judgment. The court's jurisdiction and duties ended when that judgment was entered and the execution of the sentence was solely within the authority of the state administrative body. The right of the Petitioners to be deprived of their liberty without due process of law was decided at the time of their convictions and sentencing. The grant and revocation of parole did not in any way revive or renew this right so as to allow them to demand it again. (Cf. *Burns* v. *United States*, 287 U.S. 216 (1932).) Thus, contrary to the situation in *Mempa*, which dealt with the final imposition of sentence, the petitioners' parole revocations were not a "critical stage" of a criminal proceeding and did not require a due process hearing.

II.

THE LAWS AND PROCEDURES GOVERNING PAROLE ARE PART OF A LEGISLATIVELY CREATED SYSTEM AND INVOLVE THE STATE'S INTEREST IN THE SECURITY, PROTECTION AND WELFARE OF ITS CITIZENS

The Petitioners apparently agree that parole is a privilege and not a right, but contend that such privilege, once granted, may not be revoked without a due process hearing. In support of their contention, Petitioners rely primarily on this Court's recent decision in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).

In *Goldberg*, this Court considered a situation involving the termination of public assistance payments to a specific recipient without granting an evidentiary hearing, and it was determined that such action was a denial of procedural due process in violation of the Fourteenth Amendment. The Court found that welfare benefits are a matter of statutory entitlement for persons qualified to receive them, and the termination of such benefits requires an evidentiary hearing.

The test in *Goldberg* involved a consideration of the individual's interest in avoiding a loss as measured against the governmental interest in summary adjudication. The factual distinction between *Goldberg* and the case at bar is important. In *Goldberg*, the Court was faced with balancing the very subsistance of persons receiving welfare benefits against the interest of the state in insuring that only qualified parties received those benefits. It is quite evident that the taking of a person's livelihood is indeed a grave taking for which procedural due process must be applied. The subsistance of the individual citizen of the state undoubtedly outweighs the state's interest in assuring only qualified personnel are receiving welfare payments. However in the case at bar, the safety, security and welfare of the citizens of the state far outweighs the interest of the individual parolee in remaining in a position of conditional liberty pending determination of a parole violation.

The administration of the laws and procedures governing parole is an administrative function of the state, exercised pursuant to its power to supervise and discipline its prisoners. Parole, including the right to revoke same, is a part of a total legislatively created penalogical system governing the treatment of inmates. It is not a judicial function or power.[2] The state, through its prison and correctional authorities has a significant governmental interest in managing its own internal disciplinary affairs.[3]

[2]The decision to grant or not to grant a parole involves a great many non-legal, non-adversary considerations (*Menechino v. Oswald*, 430 F.2d 403, 407 (2d. Cir. 1970)), and such considerations seem equally applicable to the decision to revoke a parole. As the Court of Appeals stated in its decision below:

> "We are persuaded that the same type of non-legal, non-adversary considerations often prevail in the parole board's determination of whether a prisoner is a 'good risk' for remaining outside the prison walls and in its decision to revoke a parole." (443 F.2d at 949).

[3]The broad discretionary power of the Board of Parole to grant and revoke paroles is a legislative determination that the governmental interests involved are of greater significance than the individ-

The precise governmental interest involved is the welfare and security of society. Certainly, the interest of the individual parolee in being allowed to remain outside the prison walls is of great significance to him. However, the governmental interest which pertains to the whole of the state's society must be of greater significance than maintaining the conditional parole type liberty of one individual.[4] This is especially true when it is realized that the individual involved is being returned to serve only the unserved portion of a sentence which was properly imposed with all the due process protections. Additionally, it should be noted that, unlike the *Goldberg* situation, Morrissey and Booher had no statutory rights, even if qualified, to be granted a parole or to be allowed to remain on parole once granted.

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[4] ...interest in maintaining conditional liberty. In *Rose v. Haskins* 388 F.2d 91 (6th Cir. 1968) the court considered a question similar to that presented in the case at bar and there commented:

> "It may be true, as the Supreme Court of Ohio suggested, that in Ohio the legislature, in granting broad discretionary powers to the Parole Commission, has shown far more concern for the protection, welfare and security of its inhabitants than for the temporary freedom on parole of a convicted felon. We know of no reason why it cannot do so." (Id. at 94-95).

[4] It would appear that the state function involved in the case at bar is not unlike that of the Federal Government, as discussed in *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 896 (1961). As stated by the court below:

> "Both are charged with the management of their own internal affairs, and both have traditionally been allowed broad discretion in the handling of matters within their jurisdictions. In the Cafeteria & Restaurant Workers Union, case the Supreme Court weighed this proprietary function of the Government with the private interest of an employee who was summarily excluded from the premises of a military installation for failure to meet security requirements, and concluded that the action taken, without a hearing and without advice as to the specific grounds for the exclusion, was not violative of the right to due process." (443 F.2d at 949).

Parole is a method of rehabilitation and correction which serves only to change the place where the prisoner serves his sentence. It does not end that sentence, but simply interrupts it in an attempt to completely and fully rehabilitate the parolee. In essence, parole provides the inmate with an opportunity to gain a complete discharge of his sentence by satisfactorily serving a relatively short period in a controlled societal situation. If such period is served successfully, the parolee's sentence is discharged and he is granted complete freedom, but if the conditions of parole are violated, the security and welfare of society require immediate reincarceration.

The records of the Iowa Board of Parole indicate 2,443 inmates of Iowa institutions were granted paroles in the five year period ending January 1, 1971. During this same period, paroles were revoked in 808 cases. Thus, if a due process hearing is to be accorded every returnee, the burden on the courts or the Parole Board would be increased by approximately 160 cases a year. This would indeed place severe restrictions on the operation of the parole system. Not only would the hearing require considerable time and additional funds, but it would also call for almost significant increase in the number of investigative and administrative personnel involved.

The per cent of parolees who have been returned to prison in Iowa over the past five years is relatively high. This would seem to indicate a rather liberal attitude on the part of the Board of Parole in that every attempt is being made to integrate the prisoner back into society at the earliest possible time. The application to parole revocations of a full due process hearing with the concomitant increase in administrative burdens would almost certainly result in a future denial of conditional liberty to inmates who, under present conditions, would be paroled. The most obvious and direct method to limit the administrative burdens and attendant costs is to deny parole to marginal cases and grant it only to those inmates who are least likely to become involved in future difficulty.

This result would appear to be contrary to the primary function of the parole system, that being to integrate the inmate back into society as soon as possible.

III.

THE INTRODUCTION OF AN ADVERSARY PROCEEDING INTO THE PAROLE SYSTEM WILL HAVE A DETRIMENTAL EFFECT ON THE REHABILITATION PROCESS

The goals of the Parole Board and the prisoner are very similar with respect to the return of the inmate to society as a useful member. The mutuality of purpose involved here was aptly described in *Hyser v. Reed*, 318 F.2d 225, 237 (D.C. Cir. 1963) cert. denied, sub nom *Thompson v. United States Board of Parole*, 375 U.S. 957 (1963) as follows:

> "The bureau of Prisons and the Parole Board operate from the basic premise that the prisoners placed in their custody are to be rehabilitated and restored to useful lives as soon as in the Board's judgment that transition can be safely made. This is plainly what Congress intends. Thus there is a genuine identity of interest if not purpose in the prisoner's desire to be released and the Board's policy to grant release as soon as possible. Here there is not the attitude of adverse, conflicting objectives as between the parolee and the Board inherent between prosecution and defense in a criminal case. Here we do not have pursuer and quarry but a relationship partaking of parens patriae. In a real sense the role of parent withdrawing a privilege from an errant child not as punishment but for misuse of the privilege. 'Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders.' Williams v. People of State of New York, 337 U.S. at 249, 69 S. Ct. at 1084. Perhaps the more correct view is that retributive justice is satisfied by the conviction whereas the sentence is a process of treatment.

> It is important to bear this in mind in determining whether there would be any gain to the parolee or to society in taking steps urged by the dissenting opinions which tend to equate parole processes with criminal prosecutions." (Id. at 237).

Petitioners have suggested that the Parole Board does not act in a role of *parens patriae* with respect to parole violations because determining the fact of violation presents an adversary situation. Certainly, this was not the situation in the cases of Morrissey and Booher nor is it the situation in the vast majority of parole revocation cases in Iowa.

Morrissey was accused of three instances of parole infraction, and the Report of violation indicates that he was advised of and admitted all three (A. 65-69). Likewise, Booher was accused of three parole infractions and the Report of violation filed by his parole officer indicates that he too was advised of and admitted all three (A. 105-108). Neither Morrissey nor Booher has ever denied committing the alleged infractions. Thus, establishment of the fact of parole violation, the area to which this Court is now asked to apply a due process hearing, was firmly established in the cases at bar by Petitioners' own admissions.

There was no controversy over whether or not Petitioners committed the alleged violations, and the determination of that fact did not present an adversary situation. Furthermore, the great majority of parole revocation cases in Iowa are similar to the case at bar in that there is no controversy between the Board of Parole and the parolee as to the fact of parole violation. In fact, since July of 1969, only three returnees have denied the violations alleged.[5] Thus, the

[5]Mr. Jack Beddel, a member of the Iowa Board of Parole since July of 1969, stated that during the time he has served on the Parole Board, all but three returnees have admitted commission of the parole infractions alleged. Mr. Beddel also noted that Petitioner Booher was not one of the three returnees who denied the alleged violations.

identity of interest between the Parole Board and the parolee is relatively unaffected even during the revocation process. The introduction of a due process hearing into this system at the revocation stage would create an adversary proceeding which would have a detrimental effect on this mutuality of interest and the attainment of the common goal.

IV.

THE PRESENT PAROLE SYSTEM IS NEITHER UNFAIR NOR ARBITRARY IN ITS OPERATION

Due process generally requires fair play, and many factors are involved in a determination of whether or not the Constitution requires that a specific right or rights be applied to a certain proceeding. Among those factors are the nature of the alleged right involved, the nature of the proceeding, and the possible administrative burdens on that proceeding (*Hannah v. Larche*, 363 U.S. 420 1960). In light of these factors and considering the fact that the basic question involved in the case at bar is whether or not the parole revocation procedures applied to Morrissey and Booher met the essential requirements of fair play, it may be helpful to examine the makeup and procedures of the Iowa Board of Parole.

The Iowa Board of Parole is a three member bipartisan board, at least one member of which must be a practicing attorney (§ 247.1, Code of Iowa, 1971). In the usual parole revocation situation, the parole agent is informed through various means that a parolee under his supervision has violated one or more conditions of his parole. Based on the information he has, the parole agent investigates the alleged violations and submits a written report of his findings to the Chief Parole Officer. Included in this report is a recommendation as to whether or not the parolee's parole should be revoked. A copy of this written report is sent to each of the Parole Board Members, who then take initial action based upon the results of the parole

agent's investigation and his recommendation. The Board members act independently at their respective domiciles as opposed to acting in concert. The decision of each of the Board members is forwarded to the Chief Parole Officer, and if two of the members have voted to revoke the parole, a warrant for the return of the parolee to the institution may be executed. Upon being returned to the institution, the returnee begins serving his sentence from the point he was at the day he was paroled. It should also be noted that the individual parole agent may request the local authorities to detain the parolee until this initial disposition by the Parole Board.

Within a short time after his return to the institution (never longer than two months), the returnee is given a hearing before the entire Parole Board. At this hearing the Parole Board goes over each of the alleged parole violations with the returnee and he is given an opportunity to orally present his side of the story to the Board. If the returnee disagrees with or denies the violation report, it is the practice of the Board to continue the hearing and conduct a further investigation into the alleged violations. At the conclusion of the hearing, the Parole Board makes final disposition of the returnee's parole revocation by affirming the initial revocation, modifying it, or reversing it.

It is significant to note that during the period July 1969 to the present, only three returnees have denied the violations alleged in the parole officer's report. In all other revocation cases, the returnee admitted the alleged violations. In the three cases involving a denial of the alleged violations a further investigation was conducted by the Parole Board, and the revocations were affirmed in two of the cases. The revocation in the third case was reversed and the returnee's parole was reinstated.[6]

[6]Much of the statistical material in this brief and all the information concerning the procedural operation of the Iowa Board of Parole was obtained from Mr. Jack Beddel of Rock Rapids, Iowa, the attorney member of the board since July, 1969.

If the contention of the Petitioners in the case at bar is that they were subjected to arbitrary action and were not dealt with fairly, that contention is without merit.

Morrissey's parole was initially revoked by the Board of Parole on January 31, 1969, and he was returned to the Iowa State Penitentiary where he was given a hearing before that Board on February 12, 1969. Booher's parole was initially revoked on September 13, 1969, and he was given a hearing at the Penitentiary on October 14, 1969.

It is realized that the revocation hearings granted in the cases of Morrissey and Booher did not occur prior to the initial revocation of parole. However, such hearings did precede the Board's final action on Petitioners' cases.

In *Goldberg v. Kelly*, 397 U.S. 254 (1970), this court determined that the hearing required must be held prior to the termination of welfare benefits. The reason a prior hearing was required:

> "... is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits." (Id. at 264).

Such a reason was not present in the instant case, nor would it be present in other similar cases, and the hearing, if necessary at all, may properly be conducted subsequent to initial parole revocation. Certainly, the welfare, protection, and security of society requires that the parole violator be immediately reincarcerated. However, the time served pursuant to such reincarceration is not credited against the parolee's original sentence unless his parole has been revoked and he is returned to the institution (§ 247.12, Code of Iowa, 1971). Thus, the initial action of the Parole Board in releasing the parolee or revoking his parole is necessary to enable the returnee to gain credit against his original sentence for any time served prior to the Parole Board hearing and final action on his case.

In addition to Morrissey and Booher, the only persons present at Petitioner's respective hearings were the three

Parole Board members and an administrative clerk. Among the written documents available to the Board in each case was the written violation report prepared by the Petitioners' respective parole officers.[7]

Although the Parole Board may continue the hearing and conduct a further investigation into the alleged infractions, this was not done in the cases involving Morrissey and Booher. Since both Petitioners admitted the violations alleged, no further investigation was considered necessary.

Petitioners have cited *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971), cert. denied, ___ U.S. ___ (1972), as setting forth basic safeguards to be provided in disciplinary actions involving prisoners. In this respect, the Court in *Sostre v. McGinnis*, stated:

> "If substantial deprivations are to be visited upon a prisoner, it is wise that such action should at least be premised on facts rationally determined. This is not a concept without meaning. In most cases it would probably be difficult to find an inquiry minimally fair and rational unless the prisoner were confronted with the accusation, informed of the evidence against him, see Armstrong v. Manzo, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L.Ed.2d 62 (1965); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed. 865 (1950), and afforded a reasonable opportunity to explain his actions." 442 F.2d at 198.

The parolee while on parole is still within the custody of the correctional authorities (Section 247.9, Code of Iowa (1971)) and as such, entitled to no greater rights than a prisoner.[8] Thus, if any due process protections are to be

[7] All Petitioners' past Penitentiary records and copies of any police reports or statements of witnesses concerning the infractions being considered are also available to the Board at the time of the hearing.

[8] In *Rose v. Haskins*, 388 F.2d 91 (6th Cir. 1968), the court followed the reasoning of the Ohio Supreme Court in determining that a parolee and a trustee are in similar positions. Petitioner's contentions to the contrary notwithstanding, such determination appears

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applicable to parole revocations, those set forth in *Sostre* should be held sufficient. Such protections were provided in the case at bar.

Prior to revocation of their paroles, both Morrissey and Booher were advised by their respective parole officers of the violations alleged. At that time, they were each given an opportunity to deny or explain the alleged violations, and both admitted the infractions charged (A. 65-69, A. 105-108). In addition, both Morrissey and Booher were given individual hearings, subsequent to their reincarceration, before the independent three-member Board of Parole. Again they were advised of each parole violation alleged and given an opportunity to deny or explain the allegations. Again, both admitted the infractions, and no further investigations were pursued.[9] Petitioners were provided with all the process they were due, and under the circumstances it is difficult to perceive in what manner they would have been benefited by an additional investigation or a more complete due process hearing.[10] Such a hearing would have served only to increase the administrative burdens and costs without significant additional benefits for the Petitioners. Accordingly, the fact of parole violation in the case of each Petitioner was rationally and fairly determined, and additional due process safeguards were not required.

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valid. The difference in the conditional liberty of the parolee and that of the trustee is one of degree only, and it is, indeed, difficult to understand why the trustee's interest in maintaining his conditional status is not in every respect as great as the parolee's interest in maintaining his.

[9]Mr. George L. Paul a member of the Iowa Board of Parole since January 1964 stated that in all the parole revocation hearings held in the last five years no more than 10 returnees denied the alleged parole violations. Petitioner Morrissey was not one of these 10. See also Footnote 5.

[10]In fact, Petitioners appear to concede there is little reason to conduct an involved fact-finding hearing when the alleged violations are established by voluntary admission or conviction in a separate criminal proceeding. (Petitioners' Brief, p. 16).

CONCLUSION

For all the above reasons, this Court is respectfully requested to affirm the lower court judgment.

Respectfully submitted,

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